IN THE

Supreme Court of the United States

October Term, 1976

No. 76-1528

AMERICAN AIRLINES, INC.,
TRANS WORLD AIRLINES, INC.,

Petitioners,

v.

CIVIL AERONAUTICS BOARD,
THE NATIONAL PASSENGER TRAFFIC ASSOC., INC.,

Respondents.

REPLY BRIEF

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The brief of the Civil Aeronautics Board ("Board") in opposition mischaracterizes the nature of its "suspension" action and of the ratemaking standards which it adopted in the *Domestic Passenger Fare Investigation* (*"DPFI"*); it also misstates the nature of petitioners' challenge to its "suspension" action.

1. The Board attempts to create the impression that its "suspension" action was the ordinary run-of-the-mill kind —characterized by "brevity and informality" and supported only by an "interlocutory" statement of reasons for suspension (Br. Opp. 5). Even a cursory examination of the Board's order of suspension is sufficient to dispel any such notion. The order devoted five pages to a detailed discussion of the substantive changes made by it to its previously established *DPFI* standards—a new utilization factor and modifications in its method of calculating dis-

count fare adjustments, cost esclation factors and cargo revenue offsets (App. 12a-16a). And those new and changed standards clearly prescribed the fares which petitioners were allowed to charge.

2. The Board attempts to avoid the clear purpose and intent of its *DPFI* standards—the establishment of long-term ratemaking standards and the prescription of a passenger fare formula based on such standards—by re-characterizing them as "guidelines." These are far more than guidelines designed to "assist the Board in evaluating future tariff proposals" (Br. Opp. 2). These standards —and that is how the *DPFI* characterizes them—determine just what fares will be permitted to go into effect; and they are used by the Board to set an absolute upper limit on fare increases filed by the carriers.

3. The Board's assertion that the changes in its *DPFI* standards were simply "tentative determinations" (Br. Opp. 5), is not only inaccurate, since they continue to be rigidly applied more than two years after their adoption, but begs the issue. Since the Board had adopted a new ratemaking regime after extensive hearings and prescribed, to the penny, the fares to be charged, on the basis of such ratemaking standards, the Federal Aviation Act does not permit it to establish and apply new or revised ratemaking standards—be they characterized tentative or otherwise—without notice and hearing. And that violation by the Board of Section 1002(d) of the Act, 72 Stat. 788(d), 49 U.S.C. § 1482(d), is what this case is all about.*

* The Board attempts to stress the tentativeness of its findings accompanying the suspension order by referring to statements in its orders that the institution of "the investigation" should " 'not be construed as any prejudgment or commitment to change' the *DPFI* principles." That statement is taken completely out of context; the investigation to which reference is made was not directed to the new and revised ratemaking standards of which petitioners complain, but to an entirely unrelated and different matter.

4. The Board also misstates the nature of petitioners' challenge to its action. It is not, as the brief in opposition states, a challenge to the Board's "basic determination to suspend" (Br. Opp. 6, fn. 3), but, like the situation in *United States* v. *Chesapeake & Ohio Ry,* 426 U.S. 500 (1976),* a challenge to action *apart* from that of suspension—namely, the adoption of new and revised rate-making standards without notice and hearing. It is not the suspension itself which petitioners seek to have reviewed—and thus no question "of safeguarding the community against irreparable losses" arises** (Br. Opp. 6); rather it is the Board's new and modified ratemaking standards which petitioners seek to have judicially reviewed. Such standards should not escape review because the Board encompasses them in a "suspension" order.

5. By misstating the nature of petitioners' challenge it is an easy step for the Board to advance its erroneous argument on mootness. The Board argues that when "petitioners voluntarily withdrew the suspended tariffs" they also "eliminated any case or controversy over whether the order suspending those tariffs was valid" (Br. Opp. 6-7).*** Petitioners are not attacking the suspension of the tariffs as such, but the adoption of new ratemaking standards. The controversy is not over tariff suspensions, but over the new ratemaking standards which continue to be used by

* In *United States* v. *Chesapeake & Ohio Ry. Co., supra,* the court, as the Board's brief concedes, reviewed conditions imposed by a suspension order.

** In this case the public interest had already been safeguarded by virtue of the hearing that was held in the *DPFI* where the original standards had been established.

*** The claim by the Board that the tariff withdrawal was "voluntary" is without merit. Badly needed fare increases would have had to have been foregone under Board regulations, if the tariffs had not been withdrawn. See page 6 of Petition.

the Board up to the present. Thus the controversy has not been eliminated by the withdrawal of the petitioners' tariffs.

6. The claim of the Board that the "suspension orders were not repetitive" (Br. Opp. 7), of course, also begs the question. The repetition, of which petitioners complain, is the continued application of unlawful ratemaking standards which will continue to evade judicial review unless the petition for certiorari is granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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